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No. 87-2070

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

CHESTER DEGEARE, *et al.*,
Petitioners,

vs.

Slattery Group Inc., et. al.,
Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals For the Eighth Circuit

BRIEF OF RESPONDENT ALPHA PORTLAND INDUSTRIES INC. IN OPPOSITION

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PARTIES TO THE PROCEEDING

Contrary to the implication in the petition, the United States moved to intervene in the District Court not because of the significance of any legal issue presented but solely in order to enforce a subrogation claim, on behalf of the Veterans Administration, for the recovery from defendant Alpha Portland Industries Inc., respondent herein ("Alpha"), of $29,017 in medical expenses paid for a single class member (in a class consisting of one hundred sixty-nine persons). The United States did not appear, much less participate, either at trial or in any aspect of the appeal to the United States Court of Appeals for the Eighth Circuit.

TABLE OF CONTENTS

	Page
Parties to the Proceeding	i
Table of Authorities	iii
Statement of the Case	1
Reasons for Denying the Petition	7
Conclusion	11

TABLE OF AUTHORITIES

Page

Cases:

Anderson v. Alpha Portland Industries Inc., 836 F.2d 1512 (8th Cir. 1988) 6

Black v. Cutter Laboratories, 351 U.S. 292, 100 L.Ed. 1188, 76 S.Ct. 824 (1956) 9

Bowen v. American Hosp. Ass'n, ____ U.S. ____, 90 L.Ed.2d 584, 106 S.Ct. 2101 (1986) 9

Chicago & E.I.R.R. Co. v. Collins Co., 249 U.S. 186, 63 L.Ed. 552, 39 S.Ct. 189 (1919) 9

Firestone Tire & Rubber Co. v. Bruch, 828 F.2d 134 (3d Cir. 1987), *cert. granted,* 56 U.S.L.W. 3682 (1988) (Docket No. 87-1054) 7,8,9,10

In Re White Farm Equipment Company, 788 F.2d 1186 (6th Cir. 1986) 4

J.E. Riley Investment Co. v. Commissioner, 311 U.S. 55, 85 L.Ed. 36, 61 S.Ct. 95 (1940) 9

Mercelis v. Wilson, 235 U.S. 579, 59 L.Ed. 370, 35 S.Ct. 150 (1915) 9

Rice v. Sioux City Cemetery, 349 U.S. 70, 99 L.Ed. 897, 75 S.Ct. 614 (1955) 8

United States v. Johnston, 268 U.S. 220, 69 L.Ed. 925, 45 S.Ct. 496 (1925) 9

Weber v. Opera on Tour Inc., 314 U.S. 615, 62 S.Ct. 96, 86 L.Ed. 495 (1941) 9

Statutes:

§ 404(a)(1) of the Employment Retirement Income Security Act of 1974, 29 U.S.C. § 1104(a)(1) 6

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Petitioners,

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ALPHA PORTLAND INDUSTRIES INC., *et al.*,
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BRIEF OF RESPONDENT ALPHA PORTLAND INDUSTRIES INC. IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

STATEMENT OF THE CASE

Petitioners' Statement of The Case, including their account of the proceedings below and their summary of the evidence, is misleading in ways that are directly material to this Court's consideration. At the outset, therefore, respondent Alpha must restate in some detail what happened in the District Court and in the Court of Appeals as a foundation for its position that certiorari should not be granted.

The DeGeare Complaint alleged that Alpha violated the Employment Retirement Income Security Act of 1974 ("ERISA") by terminating life and health insurance benefits for a class of salaried retirees. Petitioners claimed that the class

had "vested rights" in these benefits and that Alpha's termination was in breach of its Insurance and Health Plan for Salaried Employees ("salaried insurance program").

At trial, petitioners put on no witnesses. They rested their case on certain documents and deposition testimony. Alpha produced several witnesses to rebut the claims that certain class members had been promised insurance benefits "for life." Alpha introduced the many plan instruments, insurance certificates, and summary plan descriptions distributed to the class to show that the salaried insurance program it had unilaterally established and implemented over many years was modifiable and terminable. These documents had been disseminated to the class over the thirty-six year history of the salaried insurance program.

Contrary to the highly-selective descriptions of these materials cited in the Petition, these documents provided that:

(1) The Company reserved the right to modify or discontinue the insurance program "if future conditions make such action necessary or if reduction of Company earnings make it impossible to continue."

(2) "No consent of any Employee or of any other person referred to in the policy shall be required to effect termination of the policy or any modification, amendment, or change thereof."

(3) Insurance coverages "may now or hereinafter be amended, modified, or supplemented."

(4) "While Alpha hopes to be able to maintain the Plans indefinitely, it must necessarily reserve the right to terminate the plans should business conditions ever warrant it."

(5) "The Company expects and intends to continue this Plan indefinitely, but reserves the right to end or amend it."

The unrebutted evidence at trial demonstrated that, at the time the decision was made to terminate salaried retiree health and life insurance, Alpha Portland Cement Company, the employer of the class, lacked the financial means to continue retiree insurance.

Finally, Alpha offered extrinsic evidence of industry custom and practice and of course of performance under the salaried insurance program to show that insurance was not treated as a vested right for salaried retirees. The industry custom and practice was established by expert testimony. Alpha's evidence of course of performance included (1) reductions in insurance benefits to its salaried employees and retirees pursuant to coordination of benefits provisions established in the 1960's, (2) correspondence from its Personnel Manager that described retirement insurance but made no promises of lifetime benefits, and (3) lack of objections from the class members when Alpha reduced insurance benefits by coordination and later when it announced the termination of salaried retiree insurance.

After trial, petitioners filed proposed conclusions of law contending that, while there was no necessity to decide the standard applicable to Alpha's conduct, the District Court should assume "that Alpha argues correctly for an 'arbitrary and capricious' standard." Petitioners then argued that the class was entitled to prevail under the arbitrary and capricious standard.

In its sixteen-page opinion finding in favor of Alpha on all issues (reported at 652 F.Supp. 946), the District Court first described all of the changes in coverage and benefits made by Alpha to the salaried insurance program during the period from 1946 through 1982 (A-14 through A-32). The District Court found that deposition testimony of certain class members that Alpha representatives had orally promised lifetime benefits had been discredited, and it accepted both the testimony of Alpha's witnesses that no such promises had been made (A-32 and A-33) and the expert testimony that "vested rights" to retiree insurance were contrary to custom and practice (A-34 and A-35).

The District Court concluded that "the issue is one of contract interpretation ... and, if necessary, a consideration of the relevant extrinsic evidence and the parties' course of dealing" (A-36). That Court determined that petitioners, as plaintiffs, "have the burden to show that the parties intended retirees' benefits would be vested and not tied to the agreement which created them" (A-37) and that petitioners had failed to sustain that burden (A-37 through A-41).

In response to petitioners' contention that the salaried insurance program should be construed against Alpha as the drafter, the District Court made its sole remark regarding the arbitrary and capricious standard in its Conclusion of Law K:[1]

> "Plaintiffs' argument that ambiguous language in a contract falling under ERISA's provisions should be construed against the drafter of the contract is not persuasive. The Court finds instead that the judgment of the plan administrator prevails so long as it is not arbitrary and capricious. *Quinn v. Burlington Northern Inc. Pension Plan,* 664 F.2d 675, 676 (8th Cir. 1981), *cert. denied,* 456 U.S. 928 (1982); *Bruch v. Firestone Tire & Rubber Co.,* 640 F.Supp. 519, 524 n. 3 (E.D. Pa. 1986)."

Petitioners appealed to the Eighth Circuit. The unanimous opinion of the panel of the Court of Appeals, reported at 837 F.2d 812, in pertinent part affirmed the District Court's judgment "because plaintiffs failed to prove that their welfare benefits vested upon retirement" (A-10).

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[1] Petitioner's initial position in the District Court was that the class of retirees had *per se* vested rights in insurance, irrespective of any conditions or limitations in the plan documents. After the United States Court of Appeals for the Sixth Circuit rejected the same contention in *In re White Farm Equipment Company,* 788 F.2d 1186 (6th Cir. 1986), in favor of a search for the intent of the parties, petitioners sought to obtain a "presumption" in their favor on the grounds that the Plan Instrument should be construed against Alpha, as the drafter of those documents.

In its comments on standard of review, the Eighth Circuit took "note that [petitioners] invited the district court to apply this [arbitrary and capricious] standard" (A-6). After reciting the "clear weight of federal authority ... giving deference to the plan administrator's decision if it is based on factual considerations or the language of the plan" and its belief that "the district court correctly gave deference to the plan administrator's decision," the Eighth Circuit then embarked upon its consideration of the merits by stating:

> "*In any event,* we believe the administrator *and* the district court correctly construed the plan documents as not providing retirees with lifetime welfare benefits" (A-6) (Emphasis added).

The Eighth Circuit noted that petitioners "do not take issue with the facts as found by the District Court" (A-3). The Court of Appeals then reviewed that evidence at length (A-3 through A-5), agreed that petitioners had the burden of proof and rejected the claim that an "inference of an intent to vest can be presumed from the fact that the benefits are retirement benefits" (A-7). Applying "ordinary contract construction principles," including "extrinsic evidence" (A-8 and A-9), the Eighth Circuit ultimately concluded that:

> "We believe the district court correctly construed the language in the plan documents. We are also convinced that the district court's finding that the extrinsic evidence did not show an intent to provide lifetime benefits was not clearly erroneous (A-9).
>
> * * * *
>
> If we can ascertain the meaning of the language using ordinary principles of contract construction, there is no need to construe it in any other manner. We are satisfied that the district court reached the only reasonable conclusion regarding interpretation of the plan documents" (A-9).

While petitioners assert that the Court of Appeals ignored the statutory mandate set forth in Section 404(a)(1) of ERISA, 29 U.S.C. §1104(a)(1), that a plan fiduciary "discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries," the Eighth Circuit Panel made repeated reference to its decision in the companion hourly retiree case, *Anderson v. Alpha Portland Industries,* 836 F.2d 1512 (8th Cir. 1988) (A-7 through A-9), wherein the same three judges concluded:

> "[I]t would be ludicrous to conclude that Alpha breached its fiduciary duties when it discontinued benefits which were no longer required under the applicable agreements. *Phillips v. Amoco Oil Co.,* 799 F.2d 1464, 1471 (11th Cir. 1986) ("ERISA simply does not prohibit a company from eliminating previously offered benefits that are neither vested nor accrued"), *cert. denied,* ___ U.S. ____, 107 S.Ct. 1893, 95 L.Ed.2d 500 (1987)."

836 F.2d at 1520, n.6.

REASONS FOR DENYING THE PETITION

The DeGeare petition is simply an effort to ride the coattails of *Firestone Tire & Rubber Co. v. Bruch,* 828 F.2d 134 (3d Cir. 1987), *cert. granted* 56 U.S.L.W. 3682 (1988) (Docket No. 87-1054) by misstating the decision below and the facts of this case. The petition should be denied.

The precise question presented to this Court in *Bruch* is:

> "Does not Employee Retirement Income Security Act's intent that trust principles govern plan fiduciaries' action preclude *de novo* judicial review of benefits denial using contract principles and require review under the arbitrary and capricious standard of trust law?" 56 U.S.L.W. 3676-3677

In *Bruch,* the Third Circuit rejected application of the arbitrary and capricious standard in circumstances where the employer was also plan administrator in favor of a "middle course" contract construction standard favoring neither side. 828 F.2d at 137-145. Because of the grant of certiorari in *Bruch,* petitioners, now urging the Third Circuit's conclusions, try to fit this suit into that mold.

But even a cursory review of the Eighth Circuit's opinion in the present case reveals a garden-variety factual dispute involving contract construction and failure of proof which does not merit review. It certainly presents no "special and important reasons," as required by Rule 17 of this Court.

1. The Question Presented By Petitioners Was Not The Basis for The Analysis or Holding of The Court of Appeals, Could Not Affect The Outcome of These Proceedings, And Is Only An Academic Question In This Case.

The Eighth Circuit actually accepted the *de novo* standard of judicial review utilized by the District Court and found, based on its analysis of the plan documents and extrinsic evidence,

that the findings of the District Court, uncontested by petitioners, were not clearly erroneous. Indeed, the issue posed by petitioners was not involved in the analysis, is no part of the holding, and was not squarely decided by the Court of Appeals. The one-paragraph *obiter dicta* of the Court of Appeals neither justifies nor sanctions a grant of certiorari.

The Eighth Circuit, like the District Court, refused to give any special deference to either party. The courts below decided this case against the class based upon ordinary principles of contract construction, including the language of the plan documents and extrinsic evidence of course of performance and custom and practice. In reaching a result adverse to petitioners, the Court of Appeals, while paying lip service to the traditional arbitrary and capricious standard, in fact resolved the issues in Alpha's favor on the basis of the same neutral contract construction principles adopted by the Third Circuit in *Bruch* and now belatedly espoused by the DeGeare class.

In particular, the Eighth Circuit followed the "middle course" set down by the Third Circuit in *Bruch,* 828 F.2d 134, 145 (3d Cir. 1987), in holding that (1) "principles governing construction of contracts between parties bargaining at arms' length," including "industry practice" and "past practice under the plan itself," should be utilized where the employer is plan administrator and that (2) result-oriented standards in favor of either plaintiff or defendant should be rejected (A-8 and A-9).

Thus, the question raised by DeGeare, however interesting, is academic to this lawsuit and does not merit review. *Rice v. Sioux City Cemetary,* 349 U.S. 70, 74, 99 L.Ed. 897, 75 S.Ct. 614 (1955). The outcome of this case could not be affected by any answer this Court gives to the issue presented by *Bruch.* If this Court reverses the Third Circuit's decision in *Bruch* and determines that the proper standard of review requires some deference to the plan administrator, that conclusion could not

influence the result because Alpha has already prevailed under a neutral standard less favorable to it. On the other hand, if *Bruch* is affirmed, this Court will merely have adopted the standard under which Alpha has already prevailed.

This Court reviews judgments, not statements in opinions. *Bowen v. American Hosp. Ass'n.*, ____ U.S. ____, 90 L.Ed.2d 584, 597, n.12, 106 S.Ct. 2101 (1986) (plurality opinion); *Black v. Cutter Laboratories,* 351 U.S. 292, 297, 100 L.Ed. 1188, 76 S.Ct. 824 (1956); *J.E. Riley Investment Co. v. Commissioner,* 311 U.S. 55, 59, 85 L.Ed. 36, 61 S.Ct. 95 (1940). Review should not be granted where it does not appear that the question presented by the petition was necessarily decided by the Court below. *Weber v. Opera on Tour Inc.,* 314 U.S. 615, 62 S.Ct. 96, 86 L.Ed. 495 (1941).

2. The Alleged Error Was Invited By Petitioners.

Furthermore, this Court should not accept for review a general statement of law which the petitioners challenge only after having invited it in the first instance. *Cf. Chicago & E.I.R.R. Co. v. Collins Co.,* 249 U.S. 186, 63 L.Ed. 552, 39 S.Ct. 189 (1919); *Mercelis v. Wilson,* 235 U.S. 579, 59 L.Ed. 370, 35 S.Ct. 150 (1915). In view of their own role in obtaining the judicial expression of which they now complain and their shifting positions on issues of deference and burden throughout this litigation, petitioners do not write upon a clean slate.[2]

Despite this Court's admonition that it does "not grant a certiorari to review evidence and discuss specific facts," *United States v. Johnston,* 268 U.S. 220, 227, 69 L.Ed. 925, 45 S.Ct. 496 (1925), that is precisely what petitioners seek under the rubric of a "Question-Presented" which is divorced from the

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[2] *See* fn. 1, *supra.* Petitioners' later assertion of a "presumption" in their favor because Alpha drafted the Plan was considered and rejected by the Eighth Circuit as well (A-9 and A-10).

analysis and holding of the Court of Appeals and which petitioners themselves are estopped to assert.

3. Because Respondent Alpha Does Not Contest The Standard Urged By The Class, The Petition Raises No Controversy Between The Parties.

Finally, we wish to emphasize that Alpha argued to the Eighth Circuit that *Bruch* was properly decided and that it was entitled to prevail even under the Third Circuit's analysis. If certiorari were granted here, Alpha again would *not contest* the claim that neutral contract construction is appropriate where the employer is the Plan Administrator. In the event of such review, there would be no dispute between the parties about the proper resolution of the Question Presented. The Question Presented is essentially moot.

CONCLUSION

There are three separate and independent reasons why review is inappropriate here:

1. The issue petitioners raise for certiorari was not squarely presented by nor was it central to the decision or conclusions of the Court of Appeals. That issue is merely an academic or hypothetical matter in this case.

2. Even if resolution of the Question Presented were central to the outcome of this case, the alleged error was invited by the petitioners themselves.

3. In any event, because the outcome of this case would remain unaffected if the standard of review now sought by petitioners were adopted and because Alpha does not contest that neutral contract construction standard, the Question Presented is moot in the present context.

For the reasons stated, review of this case is wholly unwarranted. The petition for writ of certiorari should be denied.

Respectfully submitted,

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